No. 12692.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Palomas Land and Cattle Company, a corporation,

Appellant,

vs.

Arthur D. Baldwin, as Surviving Trustee Under a Certain Agreement of Trust Dated October 29, 1943; Louis A. Scott, John L. Rasberry and James F. Hulse, Partners Doing Business Under the Firm Name and Style of Burges, Scott, Rasberry & Hulse,

Appellees.

BRIEF OF APPELLEE ARTHUR D. BALDWIN.

On Appeal From the United States District Court for the Southern District of California Central Division

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Appellees.

BRIEF OF APPELLEE ARTHUR D. BALDWIN.

Statement of Pleadings and Facts Upon Which It Is Contended That the District Court Had Jurisdiction and That This Court Has Jurisdiction Upon Appeal.

This is an action in interpleader brought by appellee, Arthur D. Baldwin,[1] a resident and citizen of Ohio, as surviving trustee under a certain deed of trust dated October 29, 1943, seeking to interplead appellant Palomas Land and Cattle Company, a California corporation,[2] and

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[1]Appellee Arthur D. Baldwin will be hereinafter sometimes referred to, for the sake of brevity, as appellee Baldwin.

[2]Palomas Land and Cattle Company, a corporation, will be hereinafter sometimes referred to, for the sake of brevity, as appellant.

appellees Louis A. Scott, John L. Rasberry and James F. Hulse, partners doing business under the firm name and style of Burges, Scott, Rasberry & Hulse,[3] each residents and citizens of Texas, with respect to the sum of $5,488.11 [Compl. par. I; Tr. pp. 2, 3] deposited by appellee Baldwin with the registry of the United States District Court, Southern District of California, Central Division [Compl. par. VII; Tr. p. 6]. Appellant and appellee Rasberry each have demanded and claimed the right to payment from appellee Baldwin of said sum of $5,488.11 [Compl. par. IV; Tr. p. 4; Tr. pp. 81, 82; Ex. 29 of appellee Baldwin's affidavit; Tr. pp. 140-143; Ex. 34 of appellee Baldwin's affidavit; Tr. pp. 155-156]. Appellee Baldwin has never claimed any right, title or interest in and to said $5,488.11 [Compl. par. VI; Tr. p. 5]. No answer was served or filed by appellant in said interpleader action up to and including the time this appeal was perfected.

The jurisdiction of the United States District Court, Southern District of California, Central Division, existed by virtue of Section 1335, Title 28, U. S. C. A., and Rule 22, Federal Rules of Civil Procedure, Title 28, U. S. C. A. The jurisdiction of this Court exists by virtue of Section 1291 and Section 1294(1), Title 28, U. S. C. A., and by virtue of Rule 73, Federal Rules of Civil Procedure, Title 28, U. S. C. A.

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[3]Said appellees will be hereinafter sometimes referred to, for the sake of brevity, as appellee Rasberry.

SUMMARY OF THE ARGUMENT.

I.

Appellee Baldwin Is Entitled to Relief Under the Federal Interpleader Act as Set Forth in Section 1335, Title 28, U. S. C. A.

1. Jurisdictional facts are not controverted.

2. As jurisdictional facts prescribed by Section 1335, Title 28, U. S. C. A., have been established, appellee Baldwin's right to relief is absolute.

3. Appellee Baldwin's right to relief is not dependent upon validity or bona fides of the claims of the respective adverse claimants.

4. Appellee Baldwin has at all times acted in good faith towards appellant.

5. The label of trustee placed upon appellee Baldwin and others since deceased, by the October 29, 1943 agreement, does not deprive appellee Baldwin of the right to relief under the Federal Interpleader Act.

II.

The District Court Did Not Err in Awarding Appellee Baldwin Attorneys' Fees and Costs.

1. The language of the trust agreement does not prohibit an award of attorneys' fees and costs.

2. The applicable law in regard to appellee Baldwin's right to recover costs and attorneys' fees is federal law. The case of *Erie R. Co. v. Tompkins,* 304 U. S. 64, is not applicable where one is seeking equitable relief under a federal statute which creates a federal equitable right.

3. Historically, federal equity jurisprudence has permitted an award of costs and attorneys' fees to the plaintiff in an action of interpleader.

4. If federal equitable principles are not applicable in a determination of appellee Baldwin's right to recover costs and attorneys' fees in an action brought under the Federal Interpleader Act, nevertheless the state law of California has permitted recovery of attorneys' fees and costs by a trustee who has filed an action of interpleader.

5. Even if California law does not permit the recovery of attorneys' fees in an interpleader action, the failure of the trial court to apply California law may not be assigned as error for the first time on appeal.

III.

Appellant Has Violated Rule 75(e) of Federal Rules of Civil Procedure, Title 28, U. S. C. A., and, Whatever the Decision on This Appeal, Should Be Required to Bear the Costs Incurred by Such Violation.

IV.

Conclusion.

ARGUMENT.

I.

Appellee Baldwin Is Entitled to Relief Under the Federal Interpleader Act as Set Forth in Section 1335, Title 28, U. S. C. A.

1. Jurisdictional Facts Are Not Controverted.

The jurisdictional facts as set forth in appellee Baldwin's complaint [Compl. Pars. I, IV, VII; Tr. pp. 2-6] and as supported by said appellee's affidavit are not controverted. The complaint alleges and said affidavit substantiates that:

A. Appellee Baldwin, at the time of filing his action of interpleader on March 30, 1950, had in his possession and under his control a sum of money in excess of $500.00, to-wit, $5,488.11;

B. At the time of and prior to filing said action appellant and appellee Rasberry, citizens of California and Texas, respectively, each demanded payment of and claimed to be entitled to the whole of said sum of $5,488.11;

C. With the filing of this action appellee Baldwin deposited the whole of said sum into the registry of the trial court.

2. As Jurisdictional Facts Prescribed by Section 1335, Title 28, U. S. C. A., Have Been Established, Appellee Baldwin's Right to Relief Is Absolute.

A bill in interpleader involves two successive steps: The first between the plaintiff and the defendant claimants as to whether the plaintiff is entitled to force the defendants to interplead; the second between the adverse

claimants on their conflicting claims to the fund deposited by the plaintiff.

> *Girard Trust Co., et al., v. Vance, et al.* (D. C. E. D. Pa., 1946), 5 F. R. D. 109, 114.

Here we are only concerned with the first step. There has been no trial of the conflicting claims to the fund.

Appellee Baldwin has brought his action of interpleader pursuant to the Federal Interpleader Act [Compl. Par. I; Tr. p. 2]. He was not before the trial court nor is he before this Court seeking relief under a state-created right, and

> "It is well settled that 'the party who brings a suit is master to decide what law he will rely on.'"
>
> *Fielding v. Allen* (C. C. A. 2, 1950), 181 F. 2d 163, 166.

In contrast to the rules applicable to bills of interpleader followed by many state courts (see 48 C. J. S. pp. 49-54 and cases cited therein) the Federal Interpleader Act permits one to maintain an action of interpleader,

> ". . . although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another."
>
> U. S. C. A., Title 28, Section 1335.

As has been previously stated by this Court:

> ". . . the interpleader statute was intended to afford a remedy in situations where interpleader had previously been unavailable."
>
> *Rossetti, et al., v. Hill, et al.* (C. C. A. 9, 1947), 162 F. 2d 892, 893.

In enforcing an equitable right created by federal statute the federal courts must apply their own principles of equity jurisprudence.

> 2 *Moore's Fed. Practice,* 2d Ed., Section 2.09, page 456;
>
> *Holmberg v. Armbrecht,* 327 U. S. 392, 394, 395.

In *Holmberg v. Armbrecht, supra,* discussing equitable principles to be followed, in an action which was brought under a federal statute, the Supreme Court stated on page 394:

> ". . . in the York case we pointed out with almost wearisome reiteration, in reaching this result, that *we were there concerned solely with State-created rights.*[4] . . . The considerations that urge adjudication by the same law in all courts within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of an equitable right created not by a State legislature but by Congress."

And again on page 395:

> "We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. *We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. . . .*"

---

[4]Emphasis here and elsewhere in this brief is appellee Baldwin's unless otherwise noted.

Uniformly since 1936 the federal courts, *in determining a plaintiff's right to interplead defendants with adverse claims under the Federal Interpleader Act* have properly applied the principles of federal equity jurisprudence and have interpreted such act without applying state law.[5]

In so doing Federal Courts have held that, once the essential and jurisdictional facts as prescribed by Section 1335, Title 28, U. S. C. A., have been established, the right to relief under said section is absolute,

> *Railway Express Agency v. Jones* (C. C. A. 7, 1939), 106 F. 2d 341, 344;
>
> *Federal Life Ins. Co. v. Tietsort* (C. C. A. 7, 1942), 131 F. 2d 448;

and a trial court does not have the right to decline to exercise the jurisdiction conferred upon it by said Section 1335. As one Court aptly stated:

> "We consider it important that the usefulness of the statutory remedy of interpleader, which has been greatly enlarged by the Interpleader Act of 1936 and by Rule 22 of of the Federal Rules of Civil Procedure, should not be impaired by narrow and restrictive rulings. In such cases where jurisdiction clearly appears, *Federal District Courts do not have the right to decline to exercise that jurisdiction . . .*"
>
> *Maryland Casualty Co. v. Glassell-Taylor & Robinson* (C. C. A. 5, 1946), 156 F. 2d 519, 524.

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[5]Appellee Baldwin in this brief is not attempting to present any argument as to which equitable principles the Federal Court should apply when the second step of an interpleader action is before it for determination.

3. Appellee Baldwin's Right to Relief Is Not Dependent Upon Validity or Bona Fides of the Claims of the Respective Adverse Claimants.

Although it admits that this appeal is not concerned with the merits of the controversy between the rival claimants (App. Br. p. 32), appellant had devoted a large amount of space in its brief to an attempt to show that:

1. Appellee Rasberry's claim is not bona fide;

2. Appellee Baldwin knew that said claim is not bona fide (App. Br. pp. 32-37).

It is submitted that it is wholly immaterial on this appeal whether appellee Rasberry's claim is bona fide or not.

The purpose of the Federal Interpleader Act is to protect the stakeholder as much from the vexation and costs of defending two or more lawsuits as from the danger of double liability. The language from the following cases clearly illustrate this purpose.

> "It is argued that the claim asserted by the defendant Higgins is 'baseless.' We may assume, for purpose of discussion only, that his claim rests upon tenuous grounds but this assumption would not justify a dismissal of the present complaint. . . . *The mere fact that the claim of one of the claimants may be without merit, the usual situation, will not defeat the right of the stakeholder to invoke the remedy intended for his protection.*"
>
> *First Nat. Bank of Jersey City v. Fleming* (D. C. N. J., 1950), 10 F. R. D. 159, 160.

> "I conclude then that the rule of law is that if a disinterested stakeholder has knowledge that there are two or more persons who have (or dependent upon

the determination of a question of law may have) an interest in the fund—that *even though the stakeholder may be reasonably certain that one of the claims is meritorious and the others are not—that the stakeholder may rid himself of the vexation and expense of defending what he may think is the non-meritorious claim by filing interpleader.*"

Massachusetts Mut. Life Ins. Co. v. Weinress (D. C. N. D. Ill., 1942), 47 Fed. Supp. 626, 633.

To the same effect are:

Metropolitan Life Ins. Co. v. Segaritis (D. C. Pa., 1937), 20 Fed. Supp. 739, 741;

Hunter v. Federal Life Ins. Co. (C. C. A. 8, 1940), 111 F. 2d 551, 556;

Harris v. Travelers Ins. Co. (D. C. Pa., 1941), 40 Fed. Supp. 154, 157.

4. Appellee Baldwin Has at All Times Acted in Good Faith Towards Appellant.

In view of appellant's accusations of bad faith, appellee Baldwin deems it appropriate to review briefly each party's actions with regard to the assignment by appellant to appellee Rasberry of a portion of its award made pursuant to the settlement under the Mexican Claims Act of 1942 (56 U. S. Stat. at Large, Part 1, p. 1058, ch. 766, December 18, 1942), for legal services rendered in connection with such award.

A. *The letter agreement of August 6, 1943.* By a letter agreement dated August 6, 1943 [Tr. p. 32] appellant hired appellee Rasberry to "prosecute and assert the claims of appellant to any award . . . and to defend any claims asserted to any such award by Ben Williams, *et al.*,

and the Security-First National Bank of Los Angeles" and agreed that "should the matter be disposed of by litigation or settled by agreement after the filing of any lawsuit or legal procedure by undersigned or other claimants mentioned, you shall receive 15% of all sums realized by undersigned . . ." [Ex. 12 of appellee Baldwin's affidavit; Tr. p. 110.]

Thereafter, on September 18, 1943, and September 22, 1943, two legal actions were filed by Security-First National Bank of Los Angeles against appellant contesting the right of appellant to said award [Tr. pp. 32-33]. These suits were settled by the trust agreement dated October 29, 1943 [Tr. p. 74; Ex. 1 of appellee Baldwin's affidavit; Tr. pp. 84-91; App. Br. p. 4].

Appellee Rasberry contends that the letter agreement of August 6, 1943, constituted an assignment of 15% of the award payable to appellant under the terms of said trust agreement [Tr. p. 34]. *Appellant admitted by affidavits duly notarized and attached to returns filed with the United States Treasury Department on or about March 14, 1944, that such letter agreement of August 6, 1943, constituted an assignment to appellee Rasberry for legal services* [Tr. pp. 35-37; Exs. D and E of appellee Rasberry's affidavit; Tr. pp. 54-55]. However such letter agreement of August 6, 1943, was never brought to the attention of appellee Baldwin either by appellant or appellee Rasberry until May 31, 1947, when appellee Rasberry enclosed a photostatic copy of said letter agreement in a letter written to James R. Garfield[6] [Tr. p. 76; Ex. 11 of appellee Baldwin's affidavit; Tr. pp. 108-109].

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[6]James R. Garfield, since deceased, was a partner in the practice of law with appellee Baldwin and was one of the trustees named in the October 29, 1943, trust agreement.

B. *Conduct of the parties on and subsequent to May 31, 1947.* By letter dated May 31, 1947, appellee Rasberry advised appellee Baldwin that *he was entitled to 15% of the proceeds due appellant* as attorneys' fees and requested appellee Baldwin to issue two checks in disbursing the amount due appellant under the October 29, 1943, trust agreement. *Copy of this letter was forwarded to Mrs. Letha L. Stephenson and Mr. W. P. Pogson, Jr., the president and secretary-treasurer,* respectively, of appellant [Ex. 10 of appellee Baldwin's affidavit; Tr. pp. 107-108]. Enclosed in said letter was a so-called confidential letter and a copy of the letter agreement dated August 6, 1943 [Exs. 11 and 14 of appellee Baldwin's affidavit; Tr. pp. 108-109, 113-114].

The so-called confidential letter, also dated May 31, 1947, advised appellee Baldwin that appellee Rasberry still desired appellee Baldwin to issue two checks in disbursing the amount payable under the October 29, 1943, trust agreement, but that appellee Rasberry had no objection to the check evidencing his attorneys' fees being payable to appellant as joint payee [Ex. 11 of appellee Baldwin's affidavit; Tr. pp. 108-109]. Appellee Rasberry's original letter of May 31, 1947, to which was attached the so-called confidential letter and the letter agreement dated August 6, 1943, was sent to James R. Garfield *via regular mail* [Ex. 14 of appellee Baldwin's affidavit; Tr. p. 113]. A copy of said letter *without attachments* was sent to James R. Garfield *via air mail* [Ex. 14 of appellee Baldwin's affidavit; Tr. p. 113].

By letter dated June 3, 1947, James R. Garfield answered the air-mailed *copy* of appellee Rasberry's letter dated May 31, 1947, and advised that the distribution of the funds was to be made in accordance with the agreement of Octo-

ber 29, 1943 [Ex. 13 of appellee Baldwin's affidavit; Tr. p. 112]. *At that time the trustee (James R. Garfield) did not have before him the letter agreement dated August 6, 1943 as it had been forwarded with the original letter of May 31, 1947 by regular mail* [Ex. 14 of appellee Baldwin's affidavit; Tr. p. 113].

Approximately one month elapsed between the time appellee Rasberry made his request for direct payment by the letter dated May 31, 1947, and the time appellee Baldwin forwarded two checks to appellee Rasberry which represented appellant's share in the third installment of said award, one check payable to appellant and one check payable to appellant and appellee Rasberry [Ex. 15 of appellee Baldwin's affidavit; Tr. pp. 114-115]. *During said month appellant, though apprised of appellee Rasberry's request for direct payment, made no objection, either directly or indirectly, to appellee Baldwin.* Thereafter appellee Rasberry, by letters, continued to advise appellee Baldwin that he was entitled to 15% of the proceeds due appellant as attorneys' fees by virtue of the letter agreement dated August 6, 1943, and continued to request that in making disbursements appellee Baldwin issue two checks as hereinbefore noted. *Copies of all such letters were forwarded to appellant's president and secretary-treasurer* [Exs. 18 and 22 of appellee Baldwin's affidavit; Tr. pp. 118-119, 124-125]. *No objection to these requests by appellant, either directly or indirectly, was ever received by appellee Baldwin* [Ex. 31 of appellee Baldwin's affidavit; Tr. pp. 146-148]. To the contrary, the record clearly shows that appellant actively participated in this manner of distribution for several years [Ex. 16 of appellee Baldwin's affidavit; Tr. p. 116; Ex. 20 of appellee Baldwin's affidavit; Tr. p. 122; Ex. 24 of appellee Bald-

win's affidavit; Tr. p. 130; Ex. 33 of appellee Baldwin's affidavit; Tr. pp. 152-154]. It was not until January of 1950, that appellant, by letter dated January 19, 1950, directed appellee Baldwin to make all payments due it under the terms of the October 29, 1943, trust agreement direct to appellant [Ex. 29 of appellee Baldwin's affidavit; Tr. pp. 140-143]. Thereafter by letter dated February 6, 1950, appellee Rasberry advised appellee Baldwin:

> "Under no circumstances deliver our 15% part of the proceeds realized by Palomas Land and Cattle Company from the above claim to the Palomas Land and Cattle Company but, on the contrary, *we must insist that our part of these proceeds be paid over and delivered to us by the trustees*" [Ex. 34 of appellee Baldwin's affidavit; Tr. pp. 155-156].

Here for the first time appellee Baldwin knew of the conflict between appellant and appellee Rasberry [Ex. 36 of appellee Baldwin's affidavit; Tr. pp. 162-164].

The brief sequence of events hereinbefore set forth establishes conclusively that appellee Baldwin was at all times acting in good faith; that it was the acts and omissions of appellant which placed appellee Baldwin in a position where it was necessary for him to seek relief under the Federal Interpleader Act.

C. *The confidential letter.* The emphasis that appellant has placed upon the so-called confidential letter of May 31, 1947, is wholly unwarranted (App. Br. pp. 38-42). Such letter has been set out in full in appellant's brief (pp. 39-40). A careful reading of the letter fails to disclose any information contained therein of which the appellant was not already fully aware. The appellant had executed the letter agreement dated August 6, 1943

[Ex. 12 of appellee Baldwin's affidavit; Tr. pp. 110-111] upon which appellee Rasberry bases his contention of an assignment. Appellant had already admitted that such letter agreement did constitute an assignment [Tr. pp. 35-37; Exs. D and E of appellee Rasberry's affidavit; Tr. pp. 54-55]. A copy of the letter dated May 31, 1947, which was forwarded to appellant's president and secretary-treasurer, advised appellant that appellee Rasberry was requesting direct payment [Ex. 10 of appellee Baldwin's affidavit; Tr. pp. 107-109]. Appellee Baldwin was under no duty, as a trustee or otherwise, to relay information to appellant *that was already within appellant's knowledge.*

> 1 *Restatement of the Law of Trusts,* Sec. 173, Comment D, p. 448.

5. The Label of Trustee Placed Upon Appellee Baldwin and Others Since Deceased, by the October 29, 1943 Agreement, Does Not Deprive Appellee Baldwin of the Right to Relief Under the Federal Interpleader Act.

A. The Agreement Dated October 29, 1943 Merely Placed Appellee Baldwin and Others in the Position of Simple Stakeholders.

The agreement of October 29, 1943, was a business agreement to settle disputed claims to an award by the General Claims Commission.

It is true that the agreement dated October 29, 1943 [Ex. 1 of appellee Baldwin's affidavit; Tr. pp. 84-91] was prepared in the form of a trust naming appellee Baldwin, James R. Garfield, since deceased, and Clare M. Vrooman, since deceased, as trustees. A careful reading of said agreement discloses that it is not a declaration of trust wherein a trustor conveys a *res* to a trustee to be in-

vested, reinvested, managed and dealt with for uses and purposes therein declared.

The agreement constitutes a settlement between claimants asserting claims to moneys paid and to be paid under an award published by the General Claims Commission [Tr. pp. 71-74]. The named trustees were assignees of the interest of appellant and Security-First National Bank of Los Angeles [Ex. 1 of appellee Baldwin's affidavit; Tr. p. 86] and *were empowered by said agreement merely to collect and disburse sums paid on said award to appellant and said Bank, retaining a share for themselves.*

This arrangement for collection and disbursement was designed for the purpose of carrying into effect a settlement in compromise of litigation wherein appellee Baldwin and the other named trustees in reality were simple stakeholders. That simple stakeholders are entitled to relief under the Federal Interpleader Act is not open to question.

B. Appellee Baldwin, as a Trustee Placed in a Position of Double Vexation by Appellant, Is Entitled to Relief Under the Federal Interpleader Act.

As hereinbefore pointed out, the right to maintain an action of interpleader under the Federal Interpleader Act is absolute where, as here, the essential and jurisdictional facts have been established.

But appellant urges that appellee Baldwin is not entitled to interplead under the Act because he was acting as a trustee in disbursing the Mexican Claims award (App. Br. pp. 23-26). This is not the law. The Federal Interpleader Act does not deny its benefits to trustees. Such Act distinctly gives the District Courts "original jurisdic-

tion of any civil action of interpleader or in the nature of interpleader, filed by *any person,"* etc. (Sec. 1335, Title 28, U. S. C. A.).

Zechariah Chafee, Jr., draftsman of the Federal Interpleader Act of 1936, very aptly expressed the purpose of said Act when he stated:

> "The main purpose of the Federal Interpleader Act of January 20, 1936, was to give the United States courts power to protect *any stakeholder* who was threatened with conflicting claims asserted by citizens of different states."
>
> 49 *Yale Law Journal* 377.

Appellant in support of its contention that a trustee under the Federal Interpleader Act may not interplead a beneficiary and a hostile claimant refers to certain texts and states:

> "Neither in Prof. Scott's definitive treatise on 'The Law of Trusts' (and 1950 Supplement) . . . nor in Perry, 'Trusts and Trustees' (7th Ed., 1929), is there claimed for the trustee the right to interplead his beneficiary with a hostile claimant' and 'the absence of the assertion of such a right . . . is strong evidence of the fact that the asserted claim does not exist" (App. Br. p. 28).

Conclusive answers to this statement are:

1. Messrs. Scott and Perry were not writing a text on the Federal Interpleader Act;

2. Federal Courts have uniformly permitted trustees to obtain relief under such Act.

In *Security Trust Co. etc. v. Woodward, et al.* (D. C. S. D. N. Y., 1947), 73 Fed. Supp. 667, dealing with a

motion by one of the defendants to dismiss the action of interpleader filed by a trustee, the Court states (p. 669):

> "The essentials required by section 41(26) are: (1) that the stakeholder shall be subjected to conflicting claims, by (2) two or more claimants, citizens of different states; (3) to one or more of whom he is under obligation for $500 or more, and (4) he shall have deposited the amount claimed in the registry of the court to abide final judgment. Those facts being established the stakeholder may maintain interpleader in a District Court of a district . . ."

Thereafter the Court granted the trustee the requested relief as provided by the Federal Interpleader Act.

To the same effect are:

Blackman v. Mackay (D. C. S. D. N. Y., 1946), 65 Fed. Supp. 48;

United Building & Loan Ass'n v. Garrett (D. C., Ark., 1946), 64 Fed. Supp. 460;

Warner v. Florida Bank & Trust Co. (C. C. A. 5, 1947), 160 F. 2d 766.

Appellant's statement to the effect that the case of *Security Trust Co. etc. v. Woodward, et al., supra,* involves a consenting beneficiary and is therefore distinguishable from the instant case (App. Br. pp. 23-24) is, in the opinion of appellee Baldwin, without merit. A careful review of said case fails to disclose any statements to the effect that:

1. The beneficiary consented to the action of interpleader brought by his trustee, or

2. A trustee must obtain consent from a beneficiary before such trustee can maintain an action of

interpleader as between a beneficiary and a so-called stranger to the trust.

Many state courts have also granted relief to trustees by way of interpleader. See, for example:

> *Novinger Bank v. St. Louis Union Trust Co.* (Mo., 1916), 189 S. W. 826, 196 Mo. App. 335;
>
> *Leber v. Ross* (N. J., 1921), 113 Atl. 606, 92 N. J. E. Rep. 535;
>
> *Van Orden v. Anderson* (1932), 122 Cal. App. 132, 92 Pac. 572.

And where, as here, it is an affirmative act of a beneficiary, *i. e.,* the admitted assignment of a portion of the proceeds due such beneficiary, which has placed the trustee in a position of double vexation and possible double liability, there should be no doubt that the trustee is entitled to full relief under the Federal Interpleader Act.

II.

The District Court Did Not Err in Awarding Appellee Baldwin Attorneys' Fees and Costs.

1. The Language of the Trust Agreement Does Not Prohibit an Award of Attorneys' Fees and Costs.

That portion of the agreement dated October 29, 1943, upon which appellant bases its contention that appellee Baldwin is not entitled to attorneys' fees and costs reads as follows:

> "The Trustees shall execute this trust without charge. No expense shall be incurred without first obtaining the written approval of Palomas and Bank" [Ex. 1 of appellee Baldwin's affidavit; Tr. p. 86].

This provision means no more than that the designated trustees shall do the acts required of them under the terms of said agreement *without being compensated therefor* and that, if it is necessary for the trustees to incur expenses *in the execution of the trust,* then such expenses shall not be incurred by the trustees without first obtaining the written approval as provided in said agreement. The whole tenor of the provision is to allow "Palomas and Bank" control over expenditures which may arise *in the execution of the trust.*

But the attorneys' fees and costs awarded appellee Baldwin by the judgment of the District Court did not arise *in the execution of the trust, i. e.,* in receiving, caring for and disbursing the moneys received under the award. They were expenses imposed upon the so-called trustees solely because of the acts and omissions of a beneficiary of the so-called trust, which threatened to draw the so-called trustees into litigation and by possibly imposing on them double liability. Certainly the statement in the agreement that the trustees "*shall execute the trust without charge*" did not mean (and could not have been understood by the parties to mean) that the trustees, faced with lawsuits and possible liability quite apart from any execution of the trust, should be required to shoulder the expense of extricating themselves from such difficulties which were not of their own making.

It is readily apparent that expenses arising out of an action of interpleader filed by the trustee were not contemplated by the parties and they did not contract with respect thereto. The trustees by this provision did not agree to assume the obligation to settle any disputes that may

arise between appellant and an assignee of appellant. The only reasonable conclusion that can be reached is that costs and attorneys' fees arising out of the filing of an interpleader action by the trustee are not the type of expenses for which written approval had to be first obtained before it could be incurred by the trustees.

2. The Applicable Law in Regard to Appellee Baldwin's Right to Recover Costs and Attorneys' Fees Is Federal Law. The Case of Erie R. Co. v. Tompkins, 304 U. S. 64, Is Not Applicable Where One Is Seeking Equitable Relief Under a Federal Statute Which Creates a Federal Equitable Right.

As hereinbefore pointed out, appellee Baldwin did not bring this action in the trial court pursuant to any state-created right. Rather it was brought under a federal right permitting one to maintain an interpleader action in many instances where the action would not be permitted under state law. Stated in another way, where one is seeking to interplead adverse claimants under the Federal Interpleader Act, he is asking the Federal Courts to enforce equitable rights created by federal statutes, including the equitable right to recover costs and attorneys' fees. Such rights should be enforced by the Federal Courts according to federal equity jurisprudence.

Holmberg v. Armbrecht (C. C. A. 2, 1946), 327 U. S. 392, 395, 397, 90 L. Ed. 743;

Angel v. Bullington (C. C. A. 4, 1947), 330 U. S. 183.

3. **Historically, Federal Equity Jurisprudence Has Permitted an Award of Costs and Attorneys' Fees to the Plaintiff in an Action of Interpleader.**

It is admitted that there is nothing in the Federal Interpleader Act which confers costs and attorneys' fees to the interpleader. However, such an omission does not bar appellee Baldwin's right to recover such items when such rights are being enforced pursuant to a federal statute. As was aptly expressed in *Holmberg v. Armbrecht, supra,* at page 395:

> "When Congress leaves to the federal courts *the formulation of remedial details,* it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights."

And see:

> *Sprague v. Ticonic Bank,* 307 U. S. 161, 164-167, 83 L. Ed. 1184;
>
> *Trustees v. Greenough,* 105 U. S. 527, 27 L. Ed. 1157.

The case of *Guaranty Trust Co. v. York,* 326 U. S. 99, referred to in appellant's brief (App. Br. p. 44) and relied upon in the case of *Danville Building Ass'n v. Gates* (D. C. E. D. Ill., 1946), 66 Fed. Supp. 706, only involved the question of which law the Federal Courts should apply when Federal Courts *are called upon to interpret state-created rights,* and the *sole basis* of the Federal Court's jurisdiction is diversity of citizenship. As the Court in *Guaranty Trust Co. v. York, supra,* stated on page 101:

> "Our problem only touches transactions for which rights and obligations *are created by one of the States,*

and for the assertion of which, in case of diversity of citizenship of the parties, Congress has made a federal court another available forum."

And again on page 108:

"Here we are dealing with the right to *recover derived not from the United States but from one of the States. . . .*"

Since the cases of *Guaranty Trust Co. v. York, supra,* and *Danville Building Ass'n v. Gates, supra,* the United States Supreme Court has rendered a decision which governs the principle involved here, *Holmberg v. Armbrecht, supra.*

This Court, as well as other Federal Courts, has recognized the right of plaintiff to be awarded costs and attorneys' fees in a federal interpleader action.

Kohler v. Kohler (C. C. A. 9, 1939), 104 F. 2d 38, 41;

Massachusetts Mut. Life Ins. Co. v. Morris (C. C. A. 9, 1932), 61 F. 2d 104, 105;

Allen v. Hudson (C. C. A. 8, 1929), 35 F. 2d 330;

Globe Indemnity Co. v. Puget Sound Co. (C. C. A. 2, 1946), 154 F. 2d 249, 250;

Caten v. Eagle Bldg. & Loan Ass'n (D. C. W. D. Pa., 1909), 177 Fed. 996, 997.

As the right of a plaintiff in a federal interpleader action to recover attorneys' fees and costs has been established under the principles of federal equity jurisprudence, appellee Baldwin should be entitled to recover such items in this action regardless of any state law to the contrary.

4. If Federal Equitable Principles Are Not Applicable in a Determination of Appellee Baldwin's Right to Recover Costs and Attorneys' Fees in an Action Brought Under the Federal Interpleader Act, Nevertheless the State Law of California Has Permitted Recovery of Attorneys' Fees and Costs by a Trustee Who Has Filed an Action of Interpleader.

It has been held by the Courts of California that a trustee, in maintaining an action of interpleader, is entitled to recover costs and attorneys' fees from the fund deposited in the registry of the trial court.

Van Orden v. Anderson, supra.

5. Even if California Law Does Not Permit the Recovery of Attorneys' Fees in an Interpleader Action, the Failure of the Trial Court to Apply California Law May Not Be Assigned as Error for the First Time on Appeal.

At no stage of the proceedings prior to this appeal was the attention of the trial court called to the California law respecting the right of a plaintiff in an interpleader action to recover attorneys' fees. The first time that appellant raised the issue of whether California law permitted attorneys' fees in interpleader actions was on this appeal. The sole issue in this respect in all proceedings prior to this appeal was whether *the agreement dated October 29, 1943, controlled appellee Baldwin's right to recover such attorneys' fees* [Tr. pp. 210, 227].

Failure of the trial court to apply the California law in this respect, if it was required so to do, may not be assigned as error for the first time on appeal.

> *Great American Ins. Co. v. Glenwood Irr. Co.* (C. C. A. 8, 1920), 265 Fed. 594, 596-597;
>
> *Prudential Ins. Co. of America v. Carlson* (C. C. A. 10, 1942), 126 F. 2d 607, 611-612.

As was stated on page 611 in *Prudential Ins. Co. of America v. Carlson, supra:*

> "It is urged that in any event the judgment of the court awarding attorneys' fees is erroneous and must be set aside. . . . It seems to be admitted that attorneys' fees are not recoverable under the laws of New Jersey. The court therefore erred in entering judgment for the recovery of such fees.
>
> "It does not follow, however, that such error requires a reversal of the case. *At no stage of the proceedings was the attention of the trial court called to the New Jersey law.* . . . And while federal courts take judicial notice of the laws not only of the forum but also those of other states, Mather v. Stokely, 1 Cir., 218 F. 764; Brown v. Ford Motor Co., 10 Cir., 48 F. 2d 732; Parker v. Parker, 10 Cir., 82 F. 2d 575; Kaye v. May, 3 Cir., 296 F. 450, *that means no more than that one relying upon a statute of a foreign state need not plead it. It does not follow, however, that a court actually knows or considers the law of the foreign state, and one relying upon such a law is not relieved from calling it to the attention of the court at a proper time. If this is not done, failure of the court to apply the foreign law may not be assigned as error for the first time on appeal."*

III.

Appellant Has Violated Rule 75(e) of Federal Rules of Civil Procedure, Title 28, U. S. C. A., and, Whatever the Decision on This Appeal, Should Be Required to Bear the Costs Incurred by such Violation.

Appellee Baldwin respectfully brings to this Court's attention appellant's complete disregard of Rule 75(e) of the Federal Rules of Civil Procedure.

In disregarding the explicit language of said Rule 75(e) appellant has

1. Included formal parts of all exhibits;

2. Included irrelevant and formal portions of all documents;

3. Included more than one copy of the following designated documents:

A. The October 29, 1943, agreement [affidavit of Letha Metcalf, Tr. pp. 20-26; Ex. B of appellee Rasberry's affidavit, Tr. pp. 46-52; Ex. 1 of appellee Baldwin's affidavit, Tr. pp. 84-91];

B. The August 6, 1943, letter agreement [affidavit of Roland Rich Woolley, Tr. pp. 16-17; Ex. A of appellee Rasberry's affidavit, Tr. pp. 44-46; Ex. 12 of appellee Baldwin's affidavit, Tr. pp. 110-111];

C. A letter dated July 1, 1947, written by appellee Baldwin [Ex. H of appellee Rasberry's affidavit, Tr. pp. 59-61; Ex. 15 of appellee Baldwin's affidavit, Tr. pp. 114-115];

D. A letter dated January 24, 1948, written by appellee Rasberry [Ex. J of appellee Rasberry's affi-

davit, Tr. pp. 62-63; Ex. 18 of appellee Baldwin's affidavit, Tr. pp. 118-119];

E. A letter dated March 4, 1948, written by James R. Garfield [Ex. K of appellee Rasberry's affidavit, Tr. p. 64; Ex. 19 of appellee Baldwin's affidavit, Tr. pp. 120, 121];

F. Letter dated December 27, 1948, written by appellee Rasberry [Ex. L of appellee Rasberry's affidavit, Tr. pp. 65-66; Ex. 22 of appellee Baldwin's affidavit, Tr. pp. 124-125];

G. Letter dated February 4, 1949, written by James R. Garfield [Ex. M of appellee Rasberry's affidavit, Tr. pp. 66-67; Ex. 23 of appellee Baldwin's affidavit, Tr. pp. 127-129];

4. Included a large amount of material not essential to the decision of the question presented by this appeal. Appellant states, "Except where otherwise specifically indicated, *the facts pertinent to the determination of this appeal are taken from plaintiff's own affidavit* and the exhibits attached thereto" (App. Br. p. 3, Note 1). A careful examination of appellant's brief reveals that nowhere therein did appellant deem it necessary to refer to

A. The affidavit of Letha Metcalf [Tr. pp. 18-20];

B. The additional affidavit of Letha Metcalf [Tr. pp. 166-170];

C. The affidavit of appellee Rasberry [Tr. pp. 29-68] except for the following:

1. Exhibit C of appellee Rasberry's affidavit (App. Br. p. 5);

2. That portion of appellee Rasberry's affidavit noted on Tr. p. 38 (App. Br. p. 6);

3. That portion of appellee Rasberry's affidavit noted on Tr. pp. 34 and 43 (App. Br. p. 31);

D. A large portion of the lengthy affidavit of Arthur D. Baldwin [Tr. pp. 68-166]. In particular appellant has included the following exhibits which have not been used or referred to by appellant in its brief:

1. Exhibit 2 [Tr. pp. 91-93];
2. Exhibit 3 [Tr. pp. 93-96];
3. Exhibit 4 [Tr. pp. 96-98];
4. Exhibit 17 [Tr. p. 117];
5. Exhibit 21 [Tr. pp. 123-124];
6. Exhibit 25 [Tr. pp. 131-132];
7. Exhibit 32 [Tr. pp. 149-151].

Because of the failure of appellant to make any effort to follow said Rule 75(e) the record as requested by said appellant is repetitious and unusually long. Appellee Baldwin therefore respectfully requests that, whatever the decision on this appeal, appellant should be required to bear the costs incurred by such violation.

Phillips Petroleum Co. v. Williams (C. C. A. 5, 1947), 159 F. 2d 1011;

Layne-Minnesota Co. v. City of Beresford, S. D. (C. C. A. 8, 1949), 175 F. 2d 161, 169;

Pet Milk Co. v. Boland (C. C. A. 8, 1949), 175 F. 2d 151;

Chalmette Petroleum Corp. v. Chalmette's Oil Dist., Co. (C. C. A. 5, 1944), 143 F. 2d 826, 829;

Knutson v. Metallic Slab Form Co. (C. C. A. 5, 1942), 132 F. 2d 231.

IV.

Conclusion.

Clearly the facts of this case entitle appellee Baldwin to full relief under the Federal Interpleader Act and, as a part thereof, entitle him to recover attorneys' fees and costs from the fund heretofore deposited in the registry of the trial court.

It is respectfully submitted that the permanent injunction and order directing interpleader, discharging plaintiff and allowing attorneys' fees, expenses and costs should be affirmed.

Respectfully submitted,

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Lawler, Felix & Hall,
Of Counsel.